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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,
Petitioner,

VERSUS

ROBERT WELCH, INC.,
Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

C. J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma 73102
Counsel for Respondent

May, 1973

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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STATEMENT OF THE CASE

The Appellee, Robert Welch, Inc. (hereafter Respondent), the defendant below, publishes a monthly magazine, *American Opinion*, distributed throughout the United States. The Appellant, Elmer Gertz (hereafter Petitioner), the plaintiff below, "is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media [including Jack Ruby (1)]. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. He has long been involved in "civic affairs" (2).

As he has said, "There has never been a period in my mature life when I haven't made public appearances of some kind" (3).

The April, 1969, edition of *American Opinion*, contained an article entitled "Frame-up." Prior to the publication of this article, Respondent had written "articles and maintained a national 'Support Your Local Police' campaign" (4). The article was generated at a time of considerable public controversy over alleged police harassment ("FBI Director J. Edgar Hoover was writing about it, the Senate Internal Security Subcommittee was having hearings on it . . ." (5).

In late 1968, the article was commissioned by the managing editor of *American Opinion*, Scott Stanley, Jr. The impetus for the story was the indictment and trial in Chicago of a police officer, Richard Nuccio, for the murder of a youth, Ronald Nelson. The man chosen to investigate and write this assignment was Alan Stang, a free-lance writer who had previously done articles for Stanley and whose "reputation for accuracy with [Stanley] . . . has been the highest of any authority" (6). Stanley wanted Stang to learn if the "Nuccio murder trial and the publicity around it were a part of a continuing Communist effort to Blacken the reputation of America's police officers" (7). Nuccio's trial and subsequent conviction were hot issues at the time, and had been front page news in Chicago (8).

Stanley received Stang's manuscript on February 18, 1969, edited it, and then sent it to the printers within 24 hours (12). Prior to the publication of the article, Stanley did not know Petitioner and the only previous time he can remember hearing anything about Petitioner at all was a phone call received from Stang to discuss the article (9). Stanley made no independent investigation of the material contained in Stang's manuscript and based a caption and other references to "Frame up" in the April Edition solely on the information supplied by Stang (10). "Stang had written for defendant in the past, and Stanley had never had cause to question the contents of any article that Stang had written and to his knowledge there had not been any lawsuits arising out of Stang's articles" (11).

The result of Stang's investigation is the 18-page report, "Frame-up" which attempted to link Nuccio's trial with a Communist "war on police" (13) and alleged that Nuccio had been framed. Petitioner's name appears in four pages of the article (pages 4-6, and 12), and his picture is shown on page 9 with a caption authored by Stanley saying, "Elmer Gertz of Red Guild Harasses Nuccio."

Petitioner became a part of the article because he was counsel for the family of the victim of Nuccio's alleged crime. Petitioner had filed civil suits on behalf of the Nelson family against Nuccio and the city of Chicago, and he *had appeared at the coroner's inquest* where he ". . . asked questions of various witnesses . . ." (14). The inquest was the subject of considerable public interest and later led to the controversial indictment of Nuccio.

About 42,000 copies of said issue were made available throughout the *American Opinion* circulation list (15) and another 86,000 reprints of the article were later distributed throughout the country (16). Following the public dissemination of the story, Petitioner filed this libel action claiming misstatements therein had defamed him by inaccurately linking him with Communists which with other references was equal to saying he was a Communist or amounted to an inference that he was one.

QUESTIONS PRESENTED

Plaintiff's brief has injudiciously attempted to introduce new evidence, with the obvious purpose of producing bias, and to avoid determination of the issues in this case by a standard of equal justice under the law. Specifically, Plaintiff has spoken of alleged articles by Stang in publications connected with Defendant (pages 41-52 of Plaintiff's brief) and Defendant's false image as one who labels all adversaries Communists.

The questions presented by this appeal should have nothing to do with a publisher's political philosophy or how it has been expressed in the past; but rather with limits of constitutional freedom of speech. Only two basic questions are really presented by the appeal: (1) is Plaintiff a "public figure," and (2) did Defendant act with "actual malice" in publishing certain statements about Plaintiff? The cases clearly reflect, as will be presented herein, that the former is answered in the affirmative and the latter in the negative.

The questions posited by Plaintiff's brief will be answered by Respondent's propositions in order of importance. Respondent's brief will answer questions raised in Petitioner's brief, as follows:

I. Is Petitioner a person covered by the *New York Times* doctrine on libel?

II. Did Respondent act with actual malice?

III. Was Petitioner denied due process of law?

IV. Has Petitioner's right of privacy been destroyed?

V. Are attorneys entitled to special protection?

I. PETITIONER IS A PERSON COVERED BY THE NEW YORK TIMES DOCTRINE ON LIBEL.

The *Times* case (17) first enumerated the so-called "public official" rule which requires one so designated to show actual malice before he can recover for libel. Since that decision, other cases have expanded the definition of those who will be required to prove actual malice to collect damages for defamation. The *Times* spirit of a "profound national commitment to the principle that debate on public issues should be uninhabited, robust and wide-open . . ." has been found to include what has been progressively and chronologically characterized as three different areas: A. "public officials," B. "public figures" (18), and C. "matters of public interest" (19). Petitioner is clearly "public" within the spirit of the *Times* decision and any one of the three categories cited above could properly include Petitioner under the fact circumstances of this case.

A. Petitioner is a "public official."

Though Petitioner has held no elective or remunerative positions with the city, state or federal governments, he has been appointed to several jobs closely connected with government (20) and acted as a "de facto public official" by appearing, on behalf of the Nelson family, at the coroner's inquest upon the body of Ronald Nelson (whom Officer Nuccio was suspected of murdering) and questioning witnesses at a critical time in a proceeding that led to the prosecution of Officer Nuccio. "This inquest was held as authorized by Illinois statute, with expenses payable out of public funds, the purpose of which was to investigate the circumstances surrounding the death of Ronald Nelson so as to determine if a prosecution should follow" (21). After the inquest, Officer Nuccio was indicted for murder and Plaintiff filed several civil suits arising out of the alleged murder.

The Illinois Supreme Court in the *Turley* case (22) has indicated that the test for "public official" is whether or not Plaintiff "had such control and responsibility over governmental affairs, and was in such a position to significantly influence the resolution of issues of public interest as to require treatment as a public official."

The Petitioner is a well-known, highly experienced, and influential attorney within the courts of the country, his state, and (particularly) Chicago. It must be assumed that, when he appeared at the coroner's inquest and asked questions of various witnesses which led to his filing of several lawsuits, he exerted a significant amount of influ-

ence and control in delineating the circumstances surrounding the death of Nelson, which later resulted in Officer Nuccio's indictment for murder. By so doing, Plaintiff was "significantly influencing the resolution of issues of public interest" and acting as a "public official."

State courts have expanded the "public official" status to include a "senator" in student government on a state university campus and required him to show actual malice as to statements concerning him in a campus newspaper directed to "interested community" though caustic criticism and biting ridicule were used (23). The Petitioner is certainly much more analogous to a "public official" through his quasi-government connections, his appointive positions, his society status, and his active appearance at a notorious inquest than a young student who is part of the campus government.

B. Petitioner is a "public figure."

The *Walker* case (24) was the first decision which offered "public figure" as a definitive term to be applied to certain individuals precluding them from recovery in libel without a showing of actual malice. In enunciating their decision, the Court alluded to a balancing of prerogatives— ". . . the primary interest of the public is to insure that members of society are adequately equipped with knowledge to enable them to resolve all questions of public importance intelligently . . . responsible solutions to important political and social problems are subdued because citizens as well as news media are constrained to forego the expressions of their views when confronted with costly law suits . . . the paramount interest of society in receiving an

unrestricted flow of information concerning public matters is of fundamental importance, overriding the expense of a few tarnished reputations." (25)

Walker, though articulating the *Times* spirit as above, did not fully define "public figure," but rather indicated that the status was attained by position alone or by a "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" (26). One of the reasons behind the *Walker* decision was the rationale that these "public figures" commanded "sufficient access to the means of counterargument to be able to expose through discussion any falsehoods" (27). Here Petitioner not only had access to the public media, he was consistently utilizing this entree to newspapers, radio stations, television stations, book publishers, and public forums (28). Plaintiff has "appeared very frequently" (29) on radio and television programs. In fact, as Petitioner says, "There has never been a period in my mature life when I haven't made public appearances of some kind" (30). Surely this is the classic "access" alluded to in the *Walker* case.

The lower courts have done much to complete the *Walker* definition of a "public figure." Thus, the following have been found to be included: (a) a nationally prominent individual (31); (b) a person who voluntarily entered the fray of public discussion on controversial issues of pressing public concern or interest (32); (c) a person who attempts to guide public policy (33). As is transparent from the Statement of the Case, *supra*, and Petitioner's own testimony (34), Plaintiff is a nationally prominent person

who voluntarily entered the fray of public discussion on a controversial issue when he undertook to be counsel for the Nelsons at the coroner's inquest and that appearance undoubtedly guided public policy and was so intended.

A recent Fifth Circuit decision (35) came very close to describing verbatim a person like Petitioner who was held to be a "public figure." The court found that a person who authors a book, makes many radio and television appearances, and who writes magazine and newspaper articles is thrust far enough into the 'vortex' of an important public controversy to be considered a "public figure" and subject to the *Times* rule for recovery for defamation (36).

The Supreme Court adopted and expanded on these lower court delienations in *Greenbelt* (37) bringing any person that voluntarily and actively enters the public scene within the purview of the *Times* decision.

State decisions have held that the chairman of a city Republican committee was at least a "public figure" and required to prove "actual malice" in publicity arising from work he performed for a state agency (38). Petitioner had been elected as a "delegate to the Constitutional Conventional Convention of Illinois" (39), was appointed by two Chicago mayors to the Housing Committee (40), was president of the Greater Chicago Chapter of the American Jewish Congress, and founder and president of the Shaw Society of Chicago (41).

A Minesota decision (42) has held that a complainant who for part of the time was an elected state representative

and, for the remainder, a well-known university professor, author, lecturer, and adviser to government, was at all times during the libel either a "public official" or "public figure" and was required to prove actual malice in charge that he was a Communist. Petitioner has been on several of the commitees of the Chicago Commission on Human Relations and was on the advisory committee to the Chief Justice of the Municipal Court of Chicago. He is on the "Speakers' Bureau of the Adult Education Council and several times a year they secure bookings for . . ." him (43). Petitioner has written at least three books: *Frank Harris: A Study in Black and White; A Handful of Clients;* and, *Moment of Madness: The People* v. *Jack Ruby* (44).

"Public figure" was defined in New York to be a person who publicly, conspicuously, actively, and, as a leader, thrust himself into a public discussion of public and controversial matters (45). Also the law partner of a mayor (45) and a professor who made statements on a nuclear test ban treaty (47) have been held to be public figures subject to the *Times* rule.

C. The subject of the alleged libel is a matter of public interest.

As previously mentioned, to fall within the "public figure" classification, one must thrust himself into the vortex of an important public controversy. But, as the definition of those who could be commented on within the framework of *New York Times*, and the spirit of that case was developed, the scope of that decision was seen as encompassing an individual not necessarily in the "vortex" who, however, in some manner involved himself in a pub-

lic controversy (48). The test under the public interest category became whether the controversy is of sufficient public interest to warrant constitutional protection, regardless of the individual's position in the community (49).

The Supreme Court formally adopted the expanded latitude implicit in these lower court decisions in the *Rosenbloom* decision (50). This case honored the "commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous" (51).

Again, this was not a departure from the *New York Times* doctrine, but rather a logical continuum of the spirit and rationale thereof. Basically, this reasoning is a weighing of contrasting rights with the emphasis extended to the primal position society has given to freedom of speech and press (52). Where the public has a legitimate general interest and personal concern in the matter involved, it has a right to know or be informed about the matter (53). "Discussion and debate cannot be healthy if the public is not given the opportunity to weigh all the facts in arriving at a conclusion of legitimate public interest. Thus, freedom of discussion, in order to fulfill its historic function in this nation must embrace all issues about which information is needed to enable the members of society to cope with the exigencies of their period" (54). An individual, even though on the periphery of a controversy, may be subject to the *Times* privilege if he is sufficiently connected with the subject issue (55).

Petitioner was hardly on the far edge of the controversy over the Nelson death, which involved a controversy over possible harassment of policemen. The test for public interest in the matter seems more clearly met under the facts of this appeal than in those cases cited above. The public debate over harassment of policemen had been carried on in many journals (56) and was and is an issue of the highest public interest.

II. RESPONDENT DID NOT ACT WITH MALICE

Being an individual covered by *New York Times* does not automatically preclude recovery for libel nor provide blanket immunity to one's adversaries. If malice can be shown (as it was in *Butts*), the complainant can succeed. The malice required for the *Times* situation must be proven by either showing that: the publisher actually knew the alleged libel was false prior to publication (57); or, the publisher entertained serious doubts as to the truth of the publication prior thereto (58).

In proving either of these standards, the complainant has a heavy burden (59), which is not met by merely proving the issue by a preponderance of the evidence. The complainant must demonstrate actual malice by clear and convincing proof (60). Thus, even erroneous statements of both fact and opinion, as long as made in good faith, are privileged (61). Mere intent to inflict harm without knowledge of the falsity of the statement is insufficient (62).

What evidence has been presented below on the two criteria of malice? Respondent had never heard of Petitioner prior to the article. Respondent made no inde-

pendent investigation of the charges contained in his agent's story, but merely received it, edited it, and within 24 hours sent it to the printers. Respondent indicated below that he had no independent knowledge concerning the alleged libelous adjectives used to describe Petitioner, but Respondent did say he was familiar with some of the information contained in the article (63). No indication is in the record below that Respondent ever entertained any doubts (let alone, serious ones) concerning the veracity of the charges contained in the article. Quite the contrary, Respondent had full faith and confidence in the free lance writer whom he'd found to be trustworthy in the past.

The *Times* rule protects a publisher even though statements are not valid beyond question and are not an objective picture of reported events. Also a reporter may rely on a single source even though it reflects only one side of a controversy and failure to retract is not evidence of actual malice (64). That Respondent did not check the free lance writer's article may have been negligent, but failure to investigate does not, in itself, establish bad faith (65). Malice in the publication of an article coming within the *Times* privilege may not be presumed or inferred from the nature of the defamatory statement nor may it be inferred from the failure to seek out the complaining party to verify facts before publication (66). Some state courts have even concluded that a failure to make a prior investigation does not constitute sufficient proof to present a jury question as to whether the publication was a reckless disregard of whether the statements were false or not. In a paraphrase of some Supreme Court language, an Ohio court (67) has

held that before a jury question is raised sufficient evidence must be introduced to permit the conclusion that the allegedly libelous party entertained serious doubts as to the truth of the statements prior to publication.

Some courts have divided up the malice issue into two requirements. The first is that the falsity must be egregious and must relate to specific incidents (68). To call someone a "Leninist" or "Communist-Fronter" in the present era may not be prominently in bad taste except in a relatively small segment of society. Assuming that it is egregious, some states have held that rhetorical hyperbole or vigorous epithet used to describe what the publisher believes to be his subject's unreasonable position is not libelous (69). The case herein appears analogous.

Going a step further and assuming that Respondent's language fails the first test stage, no evidence has been presented that Respondent knew the statements were false or that Respondent was aware of any factor which would permit the court to conclude that he had serious doubts as to the truth of the publication. This is the second stage. The Respondent's actual state of mind is the key in determining whether this step is met or not (70). "The publisher is not required to hold his press until all possible knowledge is secured . . . the state of mind required for actual malice cannot be imputed and, therefore must be shown to exist within the person having responsibility for the publication of the defamatory statement. It is not what he should, in the exercise of due care, have believed about the truth of his statements, but what he in fact did believe about them that is relevant. In this regard more must be

shown than that the Defendant spoke with only slim evidence supporting the truth of his statement (71), made incorrect statements (72), had no personal knowledge of the subject matter of the statement (73), was a political opponent of the plaintiff (74) . . . lacked conviction of the truth of his statements or entertained a neutral state of mind in that regard (75) or made a negligent or sketchy investigation into the truth of the publication (76)" (77).

Petitioner's brief (page 40) makes the false claim that he had been called a "Communist," and complains that no attempt was made below to prove the truth of the allegedly libelous statements; but a review of the actual language will reveal that he was not called a "Communist," although the record reveals that Respondent was prevented from raising truth as a defense at trial, the real issue is whether Respondent knew the statements, as made, were false or had serious doubts concerning their truthfulness before publishing them? In *Rose* (78), it was correctly concluded that malice could not be inferred from Respondent's unsuccessful attempt to prove the truth.

Petitioner's comments on Respondent's reputation have been treated earlier in this brief, but are mentioned here again because Petitioner has entered this attack on Respondent in a section labeled "Respondent Guilty of Actual Malice." Whatever Respondent's reputation is or was, it is wholly irrelevant to this case as the trial court properly ruled and the insertion of these charges at this stage is a blatant attempt to inject alleged past wrongs, to influence the decision in this case.

Petitioner has presented as his "chief evidence of gross recklessness" (page 44) that Respondent continued to distribute articles after the filing of the complaint. It would appear that this contention was excluded by the act of Petitioner at the trial, as recognized in the opinion of the Court of Appeals, ". . . defendant offered evidence for the purpose of proving a good faith post-complaint attempt to verify the charges, and *plaintiff persuaded the court to exclude such evidence* on the ground that '. . . *anything done after the publication* of the article [is] *entirely irrelevant to these proceedings*' " (79).

Petitioner also mentions Stang's reputation and argues that Respondent should not have trusted same. Besides the rebuttal already offered on this point, a court of appeals decision (80) has held that proof of isolated instances of inaccuracy of a reporter are not sufficient to require the publisher to investigate the reporter's stories.

Finally, the trial judge who heard all the evidence concluded that ". . . Stanley clearly did not act with actual malice or with reckless disregard for the truth" (81).

III. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner, in a rather contradictory argument, labeled "Petitioner Was Denied a Fair Trial and Due Process," contends first that he was not given a "full and fair opportunity" (page 49) to present evidence of malice and then argues "there is much undisputed evidence in the record . . . to show either actual malice or gross recklessness" (page 51). The only evidence Petitioner offers that he would add at a new trial is his opinion that Re-

spordent has acted irresponsibly in the past. As suggested earlier herein, that type of evidence has no bearing on the case or the issue of actual malice. As the appeals court, such evidence might even tend to buttress Respondent's claim of lack of knowledge. "Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the 'Eisenhower' evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff" (82). As to Petitioner's contention that he was not allowed to explore the malice issue, Petitioner himself (as quoted above) indicated that his evidence of malice was received by the trial court. "Plaintiff did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused" (83).

Even if Petitioner were to introduce his "Eisenhower" evidence the most it might prove, if true, is background concepts, which do not amount to actual malice in the sense of knowing falsity or reckless disregard for the truth (84).

IV. PETITIONER'S RIGHT OF PRIVACY HAS NOT BEEN DESTROYED.

Petitioner contends his right of privacy has been "destroyed" (page 16). This is certainly hyperbole. The most that can be said is that Petitioner's right has been appropriately diminished (not razed) by the public's right of free speech and press. Because Petitioner was able to proceed on a theory of libel *per se* [possibly erroneously under

the changing climate of public acceptance of differing views and court decisions such as *Yates* (85), *Scales* (86), *Robel* (87), and especially *Raible* (88) which, *inter alia*, said calling a person a bigot, or other appropriate name descriptive of political, racial, religious, economic or sociological philosophy gives rise to no action for libel *per se*], he presented no evidence of damages other than the specious claim that belief in Communism ". . . would mean you did not believe in the institution of private property and I don't see how you could represent a client properly in wills, disputes over real estate . . ." (89). Or how any socialist lawyer could do the same? Or any lawyer represent a murderer? Does an attorney have to believe in murder—or private property for that matter—to know how to properly deal with cases involving these subjects? If Petitioner's new evidence is to be believed (surely Petitioner believes it), what harm to Petitioner's right of privacy has followed from his being lumped with Eisenhower, Nixon, and Humphrey (90) by the organ of John Birch Society which group the Petitioner claims to be totally and notoriously irresponsible?

The Petitioner has tried to buttress his right of privacy argument by ludicrous exaggeration. He has attempted to picture himself as an ". . . obscure, unknown individual caught up in the maelstrom of some issue in which the public may be interested, not of his own making" (91). Such a characterization is completely at odds with Petitioner's own testimony and complaint. Nonetheless, Petitioner (from this untenable position) argues that he has no other recourse but a vain lawsuit. Again, this is *contra* to Peti-

tioner's own testimony as to his constant and continual exposure to every media form.

Finally, Petitioner's proposal of probable cause, as the standard to be used rather than malice, would undoubtedly result in a tremendous broadening of the liability of the nation's press. This is precisely the danger sought to be avoided by the *New York Times* decision, i.e., a fettering of the press by libel suits or their threat and the consequent diminution of public awareness. The probable cause standard proposed will amount to prior censureship in its logical final form because it cannot in practice be subjective. The courts (as in criminal matters) would determine the existence of probable cause. Editors would then be required to proceed at their own peril or await the costly errors of others to learn the applicability of probable cause to the myriad of journalistic situations. Like a seach warrant, would journalists have to obtain prior judicial authority upon a showing of probable cause in order to publish? This is censorship.

As previously cited, courts have necessarily weighed the equities involved and decided that "society places a primary value on freedom of speech and press" (92) to the extent that actual malice is required in a *New York Times* situation before one libelled may recover.

V. ATTORNEYS ARE NOT ENTITLED TO SPECIAL PROTECTION.

Petitioner has attempted to carve out of the *New York Times* concept of First Amendment Freedom of Press a special exception which he deems merited by lawyers because of their attorney-client relationship. First, Petitioner

is ignoring many of the facts of the present case, in that Petitioner is and was a public figure in his own right without reference to any of his cases, at the time he entered the *Nuccio case*, and participated in the inquest that produced an indictment of Officer Nuccio. Second, the statements in the article were mostly based on the Petitioner's undisputed membership in various organizations, and his public utterances and reputation. The caption Stanley wrote specifically cites the "Red Guild" and it is just this type of characterization which forms the basis of Petitioner's charge that he was libelled.

Why should attorneys be allotted a privilege others do not share, especially the anonymous individual who is involuntarily thrust into a "public issue." In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), a rather anonymous family held captive by a group of escaped convicts were held to be within the *New York Times* purview to protect the public's right to information concerning newsworthy matters. *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971), applied the *New York Times* rule to public officials even when the defamatory remarks involved private libel. Why should an attorney, who, more than the average citizen, has the means and the access to respond to libel, be given special protection over the others? Attorneys in notorious cases, in this day of massive media coverage of famous trials, are especially given almost daily opportunity to "publicly try" their case or comment to an enormous public audience?

Petitioner might have had a stronger position under this argument were he defending a murderer, and Respondent had urged that, because Petitioner was so employed, he believed in murder; but that is not the case

here. Respondent has made a political charge that Petitioner was somehow involved in a Communist war on police either as a dupe ("Communist-fronter") or as a sympathizer ("Leninist") because of Petitioner's participation in a controversial case. Respondent has not said that Petitioner is a criminal or has committed a crime by association with any case Petitioner defended or that Petitioner, simply by representing his client, believed in whatever his client is supposed to have done. In fact, neither Petitioner nor his client is even a target of the article. The story dealt generally with harassment of police and specifically with the trial of one police officer. Petitioner was only mentioned in the article: first, because he had participated in the Nuccio inquest which led to the officer's indictment and filed civil suits against Nuccio and the police; and second, because of his alleged associations, organization memberships, *etc.* Without either of these, he would probably have never been a character in the article.

Attorneys do not have to take every case that comes their way. Certainly an attorney who takes on a notorious case with political overtones is well aware [especially if (like Petitioner), he has had past famous trials] that he is likely to be associated with the political philosophy (but not necessarily the conduct) of those he represents. Is this not fair comment to be expected, especially if an attorney continues to represent notorious clients of one political persuasion?

If all of Petitioner's argument is granted, what is left of the case? Petitioner has been labelled a "Leninist" and a "Communist-fronter," not a Communist. Assuming Peti-

tioner is neither a Leninist nor Communist-fronter, how has he been damaged? As is argued elsewhere herein, even calling a person a Communist should not be considered libelous *per se* (94). It would seem more reasons exist for not so considering the words used by Respondent. Petitioner has been charged with holding a certain political philosophy, albeit that once espousing such a philosophy might have been a crime, it is not now a crime. Surely some Democrats (or Republicans) exist who would consider themselves libeled if called a Republican, but they would still have to prove damages to maintain a libel action. Would it be libelous to call an attorney who continually represented unions, a union lawyer? Or, to call an attorney who represents right-wing clients and who supports right-wing causes with his public associations and utterances, a right-wing lawyer?

The only evidence offered by Petitioner on damages goes *contra* to his argument herein. He has said that he was defamed because if he were a Communist he would not believe in private property and thus could not handle property cases. But this is just the opposite of his argument here, *i.e.*, that an attorney's philosophy has nothing to do with the jobs he takes nor with his ability to handle those jobs. The latter, the Respondent readily concedes (you do not have to believe in the law to know and use it). As to the former, the Respondent would answer "not necessarily" because an attorney does have control over the cases he tries. In any case, Petitioner has not shown any damages, nor is it likely he could, especially in view of the low esteem he claims society holds for Respondent.

Finally, to make an exception here would open the door to a logical extension to others. The expansion fostered thereby would create the chill on freedom of the press which the court has been attempting to prevent, through the *New York Times* decision and those cases which followed it.

SUMMARY

This case presents no new issues to the Court. The fact situation, which clearly spells out Petitioner's noted status within society, places Petitioner well within the confines of the *New York Times* family of cases, either as a "public official," "public figure" or as an individual caught up in a matter of "public interest" or all three.

Thus, Petitioner must prove that Respondent acted with malice. That is, that Respondent knew the statements were false or entertained serious doubts as to their truth. No evidence has been offered either at trial or thereafter tending to show Respondent acted with the malice required. In fact, all the evidence is to the contrary to such an extent, the trial judge held, ". . . no jury could reasonably find that defendant acted with actual malice." (93)

Respectfully submitted,

C. J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma 73102

Counsel for Respondent

May, 1973

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(69) *Redding* v. *Carlton* (19____), 296 A.2d 880.

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CERTIFICATE OF SERVICE

This is to certify that service of Brief of Respondent, to which this certificate is attached, was made this _____ day of May, 1973, by mailing three copies hereof, postage fully paid, to:

Wayne B. Giampierto
120 South LaSalle Street
Suite 1805
Chicago, Illinois 60603

Attorney for Petitioners

C. J. Watts